As a result, there can be no conflict between New York law and the Second Circuit's decision to apply the prison mailbox rule to Fernandez's properly filed *coram nobis* for the purpose of calculating AEDPA tolling time because New York state courts will never be faced with the question of whether the mailbox rule should apply to such applications. *See Fernandez*, 402 F.3d at 116.

The Superintendent suggests, however, that in other kinds of cases in which a filing deadline does exist, the Second Circuit ruling will create "chaos" by requiring federal courts to treat untimely petitions as having been "properly filed." *See* Pet. at 19. This is simply untrue. The Second Circuit opinion is carefully crafted to apply only to cases in which it is clear that a prisoner's state post-conviction application was properly filed under state law. *See Fernandez*, 402 F.3d at 114. Thus if a prisoner filed an untimely collateral attack under New York Criminal Procedure Law section 440.10, the Second Circuit's ruling could *not* be used to overcome the state court's determination of untimeliness. *Cf.* Pet. at 19.

Moreover, because a federal court can apply the prison mailbox rule only after state proceedings have been completed, the decision to apply the rule does not and cannot have any impact on New York procedure or New York's ability to establish its own filing rules. *See Fernandez*, 402 F.3d at 115 n.3 ("the mailbox rule's application solely for the purpose of calculating a federal statute of limitations has no bearing on New York's own *coram nobis* proceedings or the substance of its adjudication of a properly filed application under state law"). The Second Circuit's ruling affects only the federal court's application of federal law, and New York courts remain free to decide on their own whether to apply the prison mailbox rule for

state purposes. Thus, the only real consequence of the Second Circuit's decision is that prisoners who have properly filed a post-conviction motion in New York will receive the benefit of the full year of the AEDPA statute of limitations, rather than being forced to file early to compensate for mailing or clerical delays. *See id.*

II. THE FACT THAT THUS FAR ONLY FOUR CIRCUITS HAVE ADDRESSED THE PRISON MAILBOX ISSUE, UNDER A VARIETY OF FACTUAL CIRCUMSTANCES AND DEPENDENT UPON IDIOSYNCRASIES IN STATE PROCEDURAL RULES, COUNSELS AGAINST REVIEW UNTIL A CLEAR PATTERN OF DECISIONS EMERGES.

Contrary to the assertions of the Superintendent (*see* Pet. at 11), this case has nothing to do with procedural default, and the Second Circuit's ruling does not address the question of whether a state court's failure to use the mailbox rule constitutes cause to excuse procedural default. As discussed above, Fernandez's *coram nobis* met all of the requirements for proper filing at the state level, and the Second Circuit's holding is limited to cases involving properly filed state applications. The Superintendent's extended discussion of cases involving procedural default (*see* Pet. at 11, 14-15) is therefore beside the point.

Rather, the issue in this case – whether, when calculating the amount of time tolled under the AEDPA, a federal court can apply the prison mailbox rule to a properly filed state application – has been addressed only by the Second, Fifth, Ninth and Tenth Circuits.

The Ninth Circuit, like the Second, has held that once it is clear that a state application has been "properly filed," courts are to apply the federal mailbox rule for the purpose of calculating AEDPA tolling time. *See Anthony* v. *Cambra*, 236 F.3d 568, 575 (9th Cir. 2000), *cert. denied*, 533 U.S. 941 (2001); *Saffold* v. *Newland*, 224 F.3d 1087, 1091 (9th Cir. 2000), *amended by* 250 F.3d 1262, 1268 (9th Cir. 2000), *overruled on other grounds*, *Carey* v. *Saffold*, 536 U.S. 214 (2002). In *Anthony*, the Ninth Circuit was faced with a state petition that had been properly filed under California law but that the California Supreme Court had marked as filed upon receipt, not mailing. *See Anthony*, 236 F.3d at 571, 575. As in Fernandez's case, the date of filing made no difference to the outcome of the state case, but was determinative of whether the federal habeas petition was time-barred. *Id.* The Superintendent claims that the Ninth Circuit, in holding that the prison mailbox rule should be applied to the prisoner's state petition for the purpose of calculating AEDPA tolling time, suggested that the mailbox rule was constitutionally required. *See* Pet. at 13-14. But that is plainly untrue. The Ninth Circuit based its holding on the fact that federal courts already apply the prison mailbox rule to the filing of federal habeas petitions, and that the principles underlying the mailbox rule apply "with equal force to the filing of state as well as federal petitions, because '[a]t both times, the conditions that led to the adoption of the mailbox rule are present; the prisoner is powerless and unable to control the time of delivery of documents to the court.'" *Anthony*, 236 F.3d at 575, *quoting Saffold*, 224 F.3d at 1091.[2]

[2] The Superintendent is also wrong to suggest that the Ninth Circuit relied on the fact that California courts apply the mailbox rule

(Continued on following page)

In *Coleman* v. *Johnson*, the Fifth Circuit was faced with a *pro se* petitioner who presented evidence that he mailed his state post-conviction motion six weeks before the court stamped it as "filed." 184 F.3d 398, 400 (5th Cir. 1999) (*per curiam*), *cert. denied*, 529 U.S. 1057 (2000). The result of the delay, which appeared to be due to a filing error by the state clerk, was that if the federal court did not apply the mailbox rule to the state motion, the petitioner's federal habeas petition would be time-barred. *See id.* at 402. Complicating matters was the fact that it was not clear whether the mailbox rule would apply under Texas law. The petitioner pointed to Tex. R. Civ. P. 5, which provides that filing commences upon mailing, while respondent suggested that post-conviction proceedings were controlled by Tex. R. Crim. P. art 11.07, which governs habeas proceedings and makes no mention of the timing of filing, no doubt because Texas places no deadline on the filing of state habeas petitions. *See id.* at 400, 402 n.1; Tex. R. Civ. P. 5 ("A legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing"); Tex. R. Crim. P. art. 11.07 (requiring only that an application for a writ of habeas corpus be filed "after final conviction in a felony case").[3] In a *per*

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as a matter of state law (*see* Pet. at 14), because, as noted above, in *Anthony*, the California Supreme Court had not applied the mailbox rule. *See Anthony*, 236 F.3d at 575.

[3] The Superintendent argues that *Kinnard* v *Carnahan*, 25 S.W.3d 266 (Tex. App. 2000) stands for the proposition that Texas state courts do not apply the mailbox rule. *See* Pet. at 13. But *Kinnard*, which was decided after *Coleman*, held that Texas does recognize a mailbox rule, but only if the papers were deposited in a United States Postal Service receptacle and stamped with a legible postmark. *See Kinnard*, 25 S.W.3d at 269. Notably, in *Coleman*, the petitioner's filing did bear the required legible postmark and so the mailbox rule ostensibly should have been applied. *See Coleman*, 184 F.3d at 400, 402.

curiam ruling, the Fifth Circuit concluded, as have the Second and Ninth Circuits, that federal law should govern a federal court's application of the AEDPA statute of limitations, reasoning that looking to state law "would require us to interpret state rules of filing and to address the filing systems of state courts." *Coleman*, 184 F.3d at 402. But rather than applying the federal prison mailbox rule, which has become the presumptive rule for the vast majority of filings by *pro se* prisoners in federal courts (*see* Part III, *infra*), the Fifth Circuit held that it instead would itself examine the facts of the case itself to see if the prisoner merited equitable tolling. *See Coleman*, 184 F.3d at 402.

The Tenth Circuit, in *Adams* v. *Lemaster*, took a contrary approach, holding that principles of comity *required* that the court defer to New Mexico law in determining whether to apply the mailbox rule to a state application when calculating AEDPA tolling time. 223 F.3d 1177, 1181 (10th Cir. 2000). But New Mexico had no filing deadline for the state habeas petition at issue and, not surprisingly in view of this absence of a deadline, no state law or cases addressed whether New Mexico courts would apply the mailbox rule to state habeas petitions. *See id.* at 1181 n.3, 1182. So the *Adams* court engaged in a tortuous attempt to "predict" whether the New Mexico Supreme Court would apply the mailbox rule to state habeas petitions – despite the fact that the issue would never arise in New Mexico courts given the absence of a filing deadline. *See id.* at 1182-83. The Tenth Circuit concluded that the New Mexico Supreme Court "at the very least" would require receipt by the clerk before a petition would be

treated as having been filed, but left open the question of whether actual filing by the clerk was necessary. *See id.*[4]

Beyond this handful of cases, however, the question presented here has not been addressed by any other circuit, making the issue far from ripe for Supreme Court review. The remaining cases cited by the Superintendent are inapposite or irrelevant. In *Vroman* v. *Brigano*, the prisoner's state petition had never been properly filed and was therefore never under consideration by any state court. 346 F.3d 598, 603-604 (6th Cir. 2003). *Vroman* therefore stands for the uncontroversial position that the prison mailbox rule cannot be used to overcome a state court's prior determination that a post-conviction motion had been untimely filed. *See id.* ("this court will not reconsider the Ohio state courts' determination that Vroman's post-conviction petition was untimely").

The issue in *Maples* v. *Stegall*, *Davies* v. *McCaughtry*, *Luby* v. *Brady* and *Insyxiengmay* v. *Morgan* was not whether the mailbox rule applies for the purpose of calculating AEDPA tolling time, but rather whether the mailbox rule can be used to excuse procedural default at the state level – an issue not raised by this case. *See Maples*, 340 F.3d 433, 439 (6th Cir. 2003) (applying the mailbox rule to excuse a prisoner's state procedural default); *Insyxiengmay*, 403 F.3d 657, 667 (9th Cir. 2005) (same); *Davies*, No.

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[4] In a later case dealing with Oklahoma filing law, the Tenth Circuit chose not to discern on its own what the state's law would be in regard to the mailbox rule, and instead, because Oklahoma had a procedure for responding to certified questions, certified to the Oklahoma Court of Criminal Appeals the question of whether the prison mailbox rule applies in Oklahoma post-conviction proceedings. *See Moore* v. *Gibson*, 250 F.3d 1295, 1296, 1298 (10th Cir.), *cert. denied*, 534 U.S. 1000 (2001).

99-3460, 2000 U.S. App. LEXIS 7257 (7th Cir. Apr. 14, 2000) (unpublished), *cert. denied*, 531 U.S. 962 (2000) (declining to use the mailbox rule to excuse state court determination of petitioner's state procedural default); *Luby*, No. 95-26-SLR, 1996 U.S. Dist. LEXIS 8157, at *3 (D. Del. May 16, 1996) (unpublished) (same).

And in *Brown* v. *Shannon*, *Koerner* v. *Grigas* and *Kestler* v. *Cockrell*, the filing dates of the prisoners' state petitions had no bearing on the cases' outcomes. *See Brown*, 322 F.3d 768, 771 n.3 (3d Cir. 2003) (suggesting the mailbox rule would apply to a state filing, but noting that the question was irrelevant because the prisoner's federal habeas was untimely regardless of the mailbox rule); *Koerner*, 328 F.3d 1039, 1044 n.1, 1053 (9th Cir. 2003) (petitioner's claim not procedurally barred even though mailbox rule not applied); *Kestler*, No. 02-41189, 73 Fed. Appx. 690, 691 (5th Cir. Aug. 20, 2003) (*per curiam*) (unpublished) (petitioner's federal habeas untimely even if mailbox rule were applied).

III. THE SECOND CIRCUIT OPINION IS CONSISTENT WITH THIS COURT'S AEDPA JURISPRUDENCE IN THAT IT FOLLOWS *HOUSTON* V. *LACK* AND DOES NOT CONFLICT WITH *ARTUZ* V. *BENNETT* OR *PACE* V. *DIGUGLIELMO*.

The Second Circuit's holding follows the principles this Court laid out in *Houston* v. *Lack*, 487 U.S. 266 (1988) and, contrary to the assertions of the Superintendent (*see* Pet. at 16), is in accordance with this Court's decisions interpreting 28 U.S.C. § 2244(d)(2). In *Houston*, this Court held that *pro se* prisoners' notices of appeal are considered to be "filed" at the moment of delivery to prison officials for

forwarding to the court. *See Houston*, 487 U.S. at 270. Central to the Court's reasoning was the imperative to treat fairly *pro se* prisoners, who, unlike other litigants, "cannot personally travel to the courthouse to see that the notice is stamped 'filed' or to establish the date on which the court received the notice." *Id.* at 271. Following *Houston*, federal courts in every circuit have applied the mailbox rule to nearly all filings of *pro se* prisoners, including the filing of Section 1983 complaints (*see, e.g., Cooper* v. *Brookshire*, 70 F.3d 377, 381 (5th Cir. 1995)); FTCA claims (*see, e.g., Garvey* v. *Vaughn*, 993 F.2d 776, 783 (11th Cir. 1993)); administrative complaints (*see, e.g., Longenette* v. *Krusing*, 322 F.3d 758, 765 (3d Cir. 2003)); service of discovery responses (*see, e.g., Faile* v. *Upjohn Co.*, 988 F.2d 985, 988-89 (9th Cir. 1993)); Rule 59(e) motions to amend judgment (*see, e.g., Edwards* v. *United States*, 266 F.3d 756, 758 (7th Cir. 2001) (*per curiam*)); and federal habeas petitions (*see, e.g., Marsh* v. *Soares*, 223 F.3d 1217, 1218 n.1 (10th Cir. 2000)). *See generally, Sulik* v. *Taney County, Mo.*, 316 F.3d 813, 815 (8th Cir. 2003) (noting that all federal circuits to consider the issue have extended the prison mailbox rule to civil complaints); *see also infra*, p. 17. *But see Guirguis* v. *INS*, 993 F.2d 508, 510 (5th Cir. 1993) (declining to apply the mailbox rule to BIA appeals because the applicable regulation required papers to be received by the clerk within the time fixed for filing). The Second Circuit's application of the mailbox rule to Fernandez's *coram nobis* is therefore in accordance with well-established doctrine providing that unless a statutory scheme explicitly demands otherwise, when federal interests are at stake, federal courts apply the mailbox rule.

The Second Circuit opinion also furthers the interests of comity and federalism central to this Court's habeas

jurisprudence by allowing state proceedings to take their course without interference by federal courts. *See Coleman* v. *Thompson*, 501 U.S. 722, 731 (1991) ("in a federal system, the States should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights"); *Duncan* v. *Walker*, 533 U.S. 167, 179 (2001) ("The tolling provision of § 2244(d)(2) balances the interests served by the exhaustion requirement and the limitation period"). Applying the mailbox rule to properly filed applications for the purpose of calculating AEDPA tolling time ensures that prisoners are not penalized for attempting to exhaust their claims in state court before filing in federal court. If the mailbox rule were not applied to state applications, prisoners approaching the AEDPA's one-year deadline would be forced to file their federal habeas petitions while their state applications are still pending, because while the mailbox rule gives prisoners control over the filing dates of their federal petitions, prisoners lack such control over when state courts choose to consider their state applications as having been filed.

Furthermore, the Superintendent's suggestion that the Second Circuit ruling conflicts with this Court's holdings in *Artuz* v. *Bennett* and *Pace* v. *DiGuglielmo*, 125 S.Ct. 1807 (2005) (*see* Pet. at 16) is plainly incorrect. *Artuz* v. *Bennett* explained that an application is "properly filed" under 28 U.S.C. § 2244(d)(2) so long as its "delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz*, 531 U.S. at 8. Far from "ignoring" these requirements (*see* Pet. at 17), the Second Circuit carefully observed that Fernandez's *coram nobis* application, which was timely filed and was in compliance with all other New York laws and rules governing filings, fit *Artuz* v. *Bennett*'s criteria for proper filing and therefore

appropriately tolled the AEDPA's statute of limitations. *See Fernandez*, 402 F.3d at 115.

Artuz v. *Bennett*, in dicta, also defined the term "filed" as "when [the application] is delivered to, and accepted by, the appropriate court officer." *Artuz*, 531 U.S. at 8. The Superintendent argues that this definition should control whether courts apply the mailbox rule when calculating the length of the pendency of a properly filed application because "the common meaning of the term 'filed' . . . remains consistent regardless of its context." Pet. at 17. But if "filed" means delivery to and acceptance by a court officer, the prison mailbox rule could never be applied, no matter what the circumstance, because the mailbox rule requires reading the term "filed" not as delivery to the court but as "delivery to prison authorities." *See Houston*, 487 U.S. at 275. Overruling *Houston sub silentio* could not have been the intent of *Artuz* v. *Bennett*, which read 28 U.S.C. § 2244(d)(2) in a way meant to be favorable to *pro se* habeas petitioners by allowing some applications that had been procedurally barred under state law to nonetheless toll the AEDPA's statute of limitations. *See Artuz*, 531 U.S. at 11.

The Second Circuit's ruling is also in accordance with *Pace*, which involved a prisoner whose state post-conviction petition had been rejected by the state court as untimely. *See Pace*, 125 S.Ct. at 1811. *Pace* held that state time limits constitute conditions to proper filing, and thus the petitioner's untimely filing could not toll the AEDPA's statute of limitations. *See id.* at 1814. Here, Fernandez's *coram nobis* was timely filed, meeting *Pace*'s requirements for proper filing. Moreover, underlying *Pace* was the desire to prevent prisoners from being able to "toll the [AEDPA] statute of limitations at will simply by filing untimely

state postconviction petitions." *Id.* at 1812. But because the Second Circuit's opinion applies only to applications that have been properly filed under state law, no possibility of such "abusive delay" (*see id.*) exists.

Nor is it anomalous for the Second Circuit to apply state law when determining whether an application has been properly filed, while using federal law to calculate the length of the pendency of the application. *Cf.* Pet. at 17. In Section 1983 cases filed by *pro se* prisoners, for example, federal courts look to state law to determine the length of the applicable statute of limitations, but then use the federal prison mailbox rule to determine the actual date of filing. *See, e.g., Casanova* v. *Dubois*, 304 F.3d 75, 78 n.4, 79 (1st Cir. 2002) (borrowing Massachusetts' three-year statute of limitations for personal injury actions in determining length of limitations period for prisoners' Section 1983 claims, but applying federal prison mailbox rule to determine date of filing); *Lewis* v. *Richmond City Police Dept.*, 947 F.2d 733, 736 (4th Cir. 1991) (borrowing Virginia's two-year statute of limitations for personal injury actions, but applying federal prison mailbox rule to determine date of filing). *See also Richard* v. *Ray*, 290 F.3d 810, 813 (6th Cir. 2002) (in a diversity case, applying Kentucky's one-year statute of limitations for medical malpractice claims but applying the federal prison mailbox rule to determine date of filing).

In addition, any time a court applies the prison mailbox rule – regardless of the circumstance – the court must separate the question of *whether* papers are filed from *when* they are filed, because the mailbox rule can only be applied in cases in which the prisoner's filings actually reach the court, no matter when they were given to prison officials. *See Houston*, 487 U.S. at 273 ("delivery of a notice

of appeal to prison authorities would not under any theory constitute a 'filing' unless the notice were delivered for forwarding to the district court"). Thus, in order to apply the mailbox rule, courts must always make a two-step inquiry: first, into whether the papers were ever properly filed; and second, into when the papers should be considered as having been filed. *See id.* (distinguishing between "timing" and "destination"). In this case, following this Court's jurisprudence, the first question is determined by reference to state law and the second requires application of *Houston*'s federal mailbox rule.

CONCLUSION

For the reasons given above, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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